78-1704

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1704

CALIFORNIA INSPECTION RATING BUREAU,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioner California Inspection Rating Bureau respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 591 F.2d 56 and appears at Appendix A, *infra*. The Decision and Direction of Election of the National Labor Relations Board is reported at 215 NLRB 780 and appears

at Appendix B, *infra*. The Board's Decision and Order in the unfair labor practice case is reported at 225 NLRB 870 and appears at Appendix C, *infra*, and the Board's Supplemental Decision is reported at 231 NLRB 520 and appears at Appendix D, *infra*.

JURISDICTION

The Opinion of the Court of Appeals was filed on February 13, 1979. Federal jurisdiction herein is predicated upon Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151, *et seq.*). Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board improperly concluded that the Bureau is not entitled to the political subdivision exemption under the National Labor Relations Act and whether, under the correct standard of judicial review, the Court of Appeals should have reversed that determination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(2), which provides in relevant part as follows:

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any State or political subdivision thereof * * *";

and the United States Constitution, Amendment X, which provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This case also involves Sections 8(a)(5) and 9(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(5) and 159(c), reprinted in Appendix E, *infra;* the California Constitution, Article XX, Section 21, the pertinent provisions of which are quoted in full herein; Part 3, Chapter 2, Articles 1 and 2, and Chapter 3, Article 3, of the California Insurance Code, the pertinent sections of which are reprinted in Appendix F, *infra;* and Title 10 of the California Administrative Code, Sections 2261, 2262, and 2266, reprinted in Appendix G, *infra*.

STATEMENT OF THE CASE

A. The Bureau's Role In California's Workers' Compensation Insurance Program.

California, unlike most other states, has a highly regulated system of workers' compensation insurance. The authority for such a highly regulated system derives, in the first instance, from the State Constitution. Article XX, Section 21, of the State's Constitution provides in pertinent part as follows:

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation by appropriate legisla-

> tion * * *. A complete system of workmen's compensation includes * * * full provision for regulating such insurance coverage in all its aspects * * *; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government."

Pursuant to this constitutional mandate the State legislature has enacted a series of laws regulating workers' compensation insurance.[1] Under the statutory scheme of regulation, the State Insurance Commissioner is required to enforce the various detailed legislative enactments regarding workers' compensation insurance. The Insurance Commissioner has delegated many of his enforcement functions to the Bureau.

Thus, the Bureau examines every policy form proposed to be used in California by workers' compensation insurance carriers, as well as every actual policy and endorsement issued and in effect in the State, to insure compliance

[1]Chapters 2, 3 and 4 of Part 3 of the Insurance Code (Sections 11630 through 11881), enacted pursuant to Article XX, Section 21 of the California Constitution, set forth the statutory framework of the Workers' Compensation Insurance Program in California. Chapter 3 (Sections 11750 to 11758) deals specifically with rating organizations. *See*, Appendix F, *infra*. Division 3 of the Insurance Code (Sections 12900 through 12977) sets forth the powers and duties of the Insurance Commissioner.

with statutory regulations regarding the substance and form of such policies (Tr. 84; see, *e.g.*, Insurance Code Sections 11651-11656, 11658-11659, 11736, Appendix F, *infra;* and California Administrative Code, Title 10, Sections 2261, 2262 and 2266, Appendix G, *infra*). If the Bureau determines that an insurance policy does not conform to State law, one of Petitioner's policy examiners notifies the carrier and directs it to make the necessary changes. In addition, the Bureau's Policy Examination Department reviews every policy to insure that the premium rates are not less than the minimum rates approved by the Insurance Commissioner under the authority of Insurance Code Section 11736 (Tr. 97). The Insurance Commissioner has also delegated to the Bureau the duty of receiving for filing and reviewing other detailed information which Insurance Code Section 11656.6 requires of insurance companies which seek to insure an organization or association of employers as a group (Tr. 96).

The Insurance Commissioner has delegated to the Bureau the function, formerly performed by the Department of Insurance itself, of auditing insured employers' payrolls and premises to determine whether workers are properly classified and their employer is being charged the correct premium by its insurer (Tr. 85-86). These inspections and audits are required by Insurance Code Section 11750.3(d) and (f). If any insured employer refuses to permit Petitioner to perform such an audit or inspection, Petitioner may obtain an enforcement order and sanctions through the Insurance Commissioner, under Insurance Code Section 11750.3(f). In carrying out inspections, the Bureau's employees enjoy a statutory grant

of immunity from liability, pursuant to Insurance Code Section 11759.

If the Bureau finds an error in the classification or assignment of employees on the insured employer's payroll, it notifies that employer's compensation insurance carrier. The carrier and the insured have the right to protest the audit report or the Bureau's determination that the operations in question are improperly classified under Department of Insurance regulations or that the premium charged is incorrect (Tr. 690). Disputes not settled between the carrier and the Bureau's classifier may go to the superintendent of the Bureau's Classification and Audit Review Department, and if necessary to the Bureau's Classification and Rating Committee. If the carrier or insured employer is dissatisfied with the Bureau's resolution of the dispute, it may request reconsideration. If the Bureau rejects or fails to act on the request within 30 days, the Bureau's order may be appealed to the Insurance Commissioner pursuant to Insurance Code Section 11753.1. The Insurance Commissioner, however, may deny the appeal without a hearing if he believes that probable cause for the appeal does not exist, in which case the Bureau's order becomes final (Tr. 690-691).

Under the authority of Insurance Code Section 11751.5, the Insurance Commissioner has delegated to the Bureau the statutorily mandated responsibility of collecting experience and rate statistics for ratemaking purposes (Tr. 83). If Petitioner did not perform this task, the State would have to perform the function itself (Tr. 83-84). The Bureau, relying upon data which all workers' compensation insurance carriers in California are required to submit to it, calculates average annual rates and experience, then formulates proposed minimum premium rates, which it submits to the Insurance Commissioner. The Insurance Commissioner relies heavily upon the Bureau's recommendations in issuing premium rates as required by Insurance Code Section 11732, generally adopting the Bureau's proposed rates (Tr. 106-107).

An end result of the ratemaking process is the Bureau's publication of four booklets governing workers' compensation rates in California: "California Workmen's Compensation Insurance Manual" (Resp. Exhs. 6, 7); "California Workmen's Compensation Retrospective Rating Plan" (Resp. Exhs. 6, 9); "California Workmen's Compensation Unit Statistical Plan" (Resp. Exhs. 6, 10); and "California Experience Rating Plan" (Resp. Exhs. 6, 8). The Bureau prepares and publishes these manuals exclusively, under the authority and direction of the Insurance Commissioner. The manuals are filed by the Commissioner with the Secretary of the State and are incorporated by reference into California Administrative Code, Title X, Article 7.

The Bureau derives its operating revenues from membership fees and assessments collected from all of the approximately 280 workers' compensation insurance carriers in the State of California. This includes the State Compensation Insurance Fund, operated by the State of California, which writes by far the largest proportion of such insurance. Together the Bureau's member carriers insure virtually all employers in the State. All compensa-

tion carriers operating in California are required by law to be members of the Bureau. The Bureau's assessments are based not upon services performed by the Bureau (the Bureau does not sell or write policies) but upon the amount of premiums for compensation insurance which each member carrier writes in California on an annual basis. The State Fund, as the largest compensation insurance carrier, contributes the largest proportion of the Bureau's revenues (Tr. 30).

A governing committee of five elected members and, by statutory mandate, a representative of the State Compensation Insurance Fund (an acknowledged governmental entity) oversees the Bureau's operations. The Insurance Commissioner or his delegate has the statutory right to attend all meetings of the Bureau or any of its committees (R. 147; Tr. 28-30, 61, 89-90). The Bureau's records are open to examination by the Insurance Commissioner pursuant to Insurance Code Sections 11751.1(h) and 11752.

B. The Representation Proceedings

On May 17, 1974, Professional and Clerical Employees, Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed a petition with the Board, pursuant to Section 9(c) of the National Labor Relations Act, seeking to represent all office clerical and related employees of the Bureau at its San Francisco office (R. 4; Appendix B, *infra*). On December 16, 1974, after a hearing, the Board issued a Decision and Direction of Election (Appendix B, *infra*). In its decision the Board rejected the

Bureau's contention that it was exempt from coverage under the Act as a political subdivision of the State of California engaged in governmental functions. The election was held on January 15, 1975. Sixty-eight votes were cast for the Union and 52 against (R. 165).

The Bureau thereafter filed timely objections to the election (R. 167-169). Region 20 recommended that a hearing be held with respect to some of Petitioner's objections and that the others be overruled (R. 171-178). The Bureau filed exceptions with the Board in Washington, D.C. (R. 189-195), and on January 19, 1975 the Board ordered Region 20 to grant a hearing on two of the Bureau's exceptions (R. 244-245).

Following the hearing, the Board, rejecting the Bureau's exceptions, adopted the Hearing Officer's recommendation that the Bureau's objections be overruled and certified the Union as the bargaining representative of the Bureau's employees in the unit found appropriate (R. 283-284).

C. The Unfair Labor Practice Proceedings

Following certification of the Union, the Bureau refused to bargain with the Union for the sole purpose of obtaining judicial review of the Board's decision. The Union subsequently filed unfair labor practice charges against the Bureau. On April 8, 1976, the Regional Director issued a complaint and notice of hearing (R. 286-288), alleging that Petitioner had refused to bargain with the Union, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. § 158(a)(1) and (5)).

Following a motion for summary judgment filed by the General Counsel on May 6, 1976 (R. 292-296), the Board

transferred the proceedings to Washington, D.C. The Bureau then filed a response to the Board's Notice to Show Cause, contending that it was not an employer within the meaning of the Act and that its exceptions to the Hearing Officer's Report on Objections had been improperly overruled (R. 300-301). On August 9, 1976 the Board issued its Decision and Order (Appendix C, *infra*) granting the General Counsel's motion for summary judgment and finding that the Bureau was an employer subject to the Board's jurisdiction and that the Bureau had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union pursuant to the Board's certification.

On its own motion the Board thereafter decided to reconsider the question of whether it had properly asserted jurisdiction over the operations of the Bureau (R. 333). On August 22, 1977, the Board issued a Supplemental Decision and Order, reaffirming its determination that the Bureau is an employer subject to the Act (R. 377-380).

D. The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order to bargain, holding that the "Board had jurisdiction over the Bureau for the reasons stated by the Board in its Decisions" (Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of This Court Regarding The Interpretation Of The Political Subdivision Exemption.

In *N.L.R.B. v. Natural Gas Utility District*, 402 U.S. 600 (1971), this Court, noting the absence of legislative history

shedding light on Congress' intent in enacting the political subdivision exemption of Section 2(2) of the Act, held that the Board's construction of the "broad statutory term" was entitled to "great respect" but stopped short of deciding that an entity must necessarily meet the Board's criteria in order to qualify for the statutory exemption. *N.L.R.B. v. Natural Gas Utility District, supra,* 402 U.S. at 605. See, *N.L.R.B. v. Natchez Trace Electric Power Association,* 476 F.2d 1042, 1044 (5th Cir. 1973). In *Natural Gas Utility District,* the Court, on the basis of the utility district's creation under state law and its possession of governmental-type powers delegated by the state legislature, concluded that the utility district was exempt from NLRB jurisdiction as a political subdivision. The factors which the Court found determinative were that the utility district was administered by a board of commissioners that was responsible to public officials; that it was created by judicial order pursuant to an authorizing state law for delivery of services to the public; that it operated on a nonprofit basis and was exempt from taxation; that its records were public and open to inspection; that in exercising its ratemaking function the district was required to publish an annual statement and to hold hearings on protests against rates; that it had the power of eminent domain; and that its commissioners were subject to removal under state law. *N.L.R.B. v. Natural Gas Utility District, supra,* 402 U.S. at 605-609.

The Court did *not* consider, as an element in the definition of the term "political subdivision" in Section 2(2) of the Act, the degree of control which the utility district exercised over its own labor relations policy.

The Board's decisions in the instant case, subsequently approved by the Court of Appeals, are inconsistent with *Natural Gas Utility District,* Section 2(2) of the Act and the Board's own jurisdictional standards. The Board assumed, in rejecting the Bureau's claim of political subdivision status, that Petitioner was a nonexempt employer and that, accordingly, the decision to decline jurisdiction was discretionary, depending upon such factors as the state's degree of control over the Bureau's employees (see, Appendix D, *infra*). The Board should have determined, utilizing the *Natural Gas Utility District* standard, that the Bureau itself constitutes an exempt political subdivision under the Act, since it holds powers relinquished and/or formerly exercised by the Insurance Commissioner. *See, N.L.R.B. v. Lewiston Orchards Irrigation Dist.*, 469 F.2d 698 (9th Cir. 1972) (refusing to enforce the Board's order in 190 NLRB 39 (1971)); *Rural Fire Protection Company,* 216 NLRB 584 (1975).

The Bureau clearly satisfies the standards of political subdivision status articulated by the Court in *Natural Gas Utility District.* Petitioner is organized pursuant to provisions of the California Insurance Code to perform a regulatory function in the public interest. It is licensed by the Insurance Commissioner. Its functions are strictly prescribed by law. The Bureau operates on a nonprofit basis, performing delegated functions of the Insurance Commissioner, including examination and approval of the substance and form of all workers' compensation insurance policies issued in the State and audits of insured employers' payrolls and inspection of their premises. It has the power to review and determine in the first instance disputes over classification of risks and premium charges, and it collects statistics and formulates proposed minimum premium rates, which are generally adopted by the Insurance Commissioner and published in the Administrative Code as the minimum rates currently in effect below which insurers are prohibited from charging. Insurance Code Section 11736. The Bureau levies assessments on members based on premium charges, established by the Insurance Commissioner, for policies written in the State; it does not receive payment on the basis of services rendered. The Insurance Commissioner has the right to participate in the meetings of the Bureau's governing committees, on which a representative of the State Compensation Insurance Fund sits on a permanent basis by statutory mandate. The Bureau's books and records are open to inspection by the Insurance Commissioner.

If allowed to stand, the decisions of the Board and the Court of Appeals will not only create uncertainty and inconsistency in the application of the Section 2(2) exemption for political subdivisions, but will allow the delivery of important public services to be interrupted and jeopardized by strikes and labor disputes. Such a result would contravene the intent of the California Legislature in denying public employees the right to strike,[2] and the declared intent of Congress in adopting parallel exemptions from coverage of the Act.[3]

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[2]California Government Code Section 3509; *City and County of San Francisco v. Evankovich,* 69 Cal.App.3d 41, 47, n.5 (1977).

[3]In the 1947 Amendments to the Act, Congress exempted Federal Reserve banks from coverage under the Act, on the ground that the Federal Reserve performed important governmental functions which should not be interrupted by strikes. 93 Cong. Rec. 6686 (June 6, 1947), II *Legislative History of the Labor Management Relations Act of 1947,* 1605-1606.

2. The Decision Below Creates A Potential Constitutional Conflict Which Was Not Resolved Properly Under The Court's Most Recent Decision Involving Board Jurisdiction.

In *N.L.R.B. v. Catholic Bishop of Chicago,* ..... U.S. ....., 59 L.Ed.2d 533 (1979), the Court was faced with the question of NLRB jurisdiction over religious schools. The Court decided that where the Board's exercise of its jurisdiction would give rise to serious constitutional questions the Court "must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that the Act grants jurisdiction." *N.L.R.B. v. Catholic Bishop of Chicago, supra,* 59 L.Ed.2d at 541.

There can be no doubt that serious constitutional questions are raised here by the Board's exercise of jurisdiction. *National League of Cities v. Usery,* 426 U.S. 833 (1976), held that a state has reserved to it by the Tenth Amendment to the United States Constitution the right to order its governmental functions free of continuing federal regulation under the Commerce Clause (in that instance, regulation under the Fair Labor Standards Act, 29 U.S.C. § 210, *et seq.*). The right of a state to structure its traditional health and safety functions clearly encompasses the right to have state-established and regulated administrative entities perform those functions free of federal regulation under the Commerce Clause. If the Board were to exercise jurisdiction over the Bureau and its employees, it would interfere with California's ability to carry out its legislatively mandated workers' compensation insurance scheme. Because of this serious constitutional question,

there must be an affirmative intention of Congress to exercise jurisdiction. None is present. The grant of certiorari is accordingly justified to review the Board's assertion of jurisdiction.

3. The Shifting, Divided And Inconsistent Decisions Of The Board Interpreting The Political Subdivision Exception Raise Significant Statutory And Constitutional Issues Which Call For Clarification.

In a recent series of decisions the NLRB has repeatedly used conflicting criteria to determine whether it will exercise jurisdiction over an entity which is related to a political subdivision. Among these criteria are whether the entity is performing an essential government function, *Rural Fire Protection Company,* 216 NLRB 584 (1974); whether the entity is intimately connected with exempt functions, *Roesch Line, Inc.,* 224 NLRB 203 (1976); whether the entity is performing an exempt function as mandated by the legislature, *Transit Systems, Inc.,* 221 NLRB 299 (1975); whether the entity is performing a statutorily required service, *Columbia Transit Corp.,* 226 NLRB 812 (1976); and whether the entity has sufficient control over the terms and conditions of employment to bargain effectively, *National Transportation Service, Inc.,* 240 NLRB No. 64 (1979). In each of these cases the members of the Board were sharply divided as to whether or not to exercise jurisdiction. Deferral by the courts to such an inconsistent standard is not warranted, particularly where the standards are not appropriately applied to the facts at hand and the standard involved is based upon considerations which fall outside the expertise of the NLRB. *Local 777,*

Democratic Union Organizing Committee, Seafarers' Int'l Union v. N.L.R.B. ..... F.2d ....., 99 LRRM 2903 (D.C. Cir. 1978).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

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(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 77-3675

National Labor Relations Board,
Petitioner,
vs.
California Inspection Rating Bureau.
Respondent.

[Filed February 13, 1979]

Petition for Enforcement of an Order of
the National Labor Relations Board

OPINION

Before: DUNIWAY and SNEED, Circuit Judges, and KELLEHER,* District Judge

DUNIWAY, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order requiring the California Inspection Rating Bureau to bargain with the Professional and Clerical Employees, Division of Teamsters Local 856, as the representative of certain of the Bureau's employees.

The Union won a Board conducted representation election, and the Bureau then refused to bargain with the

*The Honorable Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

Union in order to assert its defenses. These are (1) that the Bureau, which is now called Workers' Compensation Insurance Rating Bureau, is a "political subdivision" of the state of California, within the meaning of § 2(2) of the National Labor Relations Act as amended, (29 U.S.C. § 152 (2)), and so exempt from the provisions of the Act, and (2), alternatively, that the Bureau's operations are so intimately connected with the State as to require the Board to decline jurisdiction over the Bureau.

These defenses were first asserted by the Bureau in opposition to the Union's petition for an election, and were carefully considered by the Board and rejected in a Decision and Direction of Election reported at 215 NLRB 780 (1974). The same defenses were again considered in a Decision and Order in the refusal to bargain case reported at 225 NLRB 870 (1976) and in a Supplemental Decision and Order in that case reported at 231 NLRB No. 75, (1977).

We are satisfied that the Board's findings of fact are fully supported by substantial evidence upon the record considered as a whole. The Board correctly applied the principles stated by the Court in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee,* 1971, 402 U.S. 600, 602-605, in rejecting the Bureau's first defense. *See also, NLRB v. Natchez Trace Electric Power Ass'n,* 5 Cir., 1973, 476 F.2d 1042; *NLRB v. Randolph Electric Membership Corporation,* 4 Cir., 1965, 343 F.2d 60. The Board had jurisdiction over the Bureau for the reasons stated by the Board in its Decisions.

The Board has considerable discretion in deciding whether or not to exercise jurisdiction that it has. *NLRB v. W. B. Jones Lumber Co.,* 9 Cir., 1957, 245 F.2d 388, 390-91. For the reasons stated by the Board in its Decisions, we conclude that that discretion was not abused, and that the Board's decision to exercise its jurisdiction "has a reasonable basis in the evidence and is not inconsistent with the law." *NLRB v. E. C. Atkins & Co.,* 1947, 331 U.S. 398, 403.

The Board's order will be enforced.

Appendix B

California Inspection Rating Bureau and Professional and Clerical Employees Division of Teamsters Local No. 856, Petitioner. Case 20—RC—12062

December 16, 1974

DECISION AND DIRECTION OF ELECTION

By Chairman Miller and Members Fanning and Jenkins

Upon a petition duly filed on May 17, 1974, under Section 9(c) of the National Labor Relations Act, as amended, a hearing in this case was held on various days in June, July, and August, 1974, before Hearing Officer Edward S. Kaplan. Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the above-entitled matter was duly transferred by the Regional Director for Region 20 to the Board for decision. The Employer filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The labor organization involved claims to represent certain employees of the Employer.

2. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.[1]

3. The basic issues in this case are whether the California Inspection Rating Bureau, herein called the Bureau or the Employer, is an "employer" within the meaning of Section (2) of the Act[2] and, if so, should the Board in its discretion decline to assert jurisdiction because of the special relationship of the Employer to exempt state functions. The Employer contends that it is exempt from coverage of the Act because it is a political subdivision of the State of California directly engaged in state-related functions. In the alternative, the Employer contends that, even if the Board should find that it is an employer subject to the Board's jurisdiction, the Board should exercise its discretionary authority to refuse to assert jurisdiction because of the "unique relationship" and "intimate connection" which the Bureau enjoys with the State of California which is exempt from coverage under the Act.

The Employer is a nonprofit association organized under the authority of the California statutes and licensed by the Insurance Commissioner of the State of California pursuant to its workmen's compensation legislation. Although the code does not preclude the establishment and operation of

[1]The record shows that the Employer receives revenues from fees and assessments in excess of $500,000 annually, and purchases goods directly or indirectly from suppliers who in turn purchase goods outside the State of California in excess of $50,000 annually.

[2]Sec. 2(2) of the Act provides in relevant part, "the term 'employer' . . . shall not include . . . any state or political subdivision thereof. . . ."

more than one rating organization similar to the Employer's, in practice no other rating organization has ever been established, and only the Employer performs the workmen's compensation insurance rating functions set out in the California Insurance Code.

The Bureau functions exclusively in California, and the rating and statistical work performed by the Bureau pertains only to workmen's compensation insurance business written in the State of California. The Bureau does not write or sell insurance policies, but performs a regulatory function required and provided for by the State Insurance Commissioner and the California Insurance Code. It performs the same assessment functions for all licensed firms which write workmen's compensation in the State, including the State fund. Additionally, the Bureau performs for the Insurance Commissioner certain statistical work required by the Insurance Code.

Although not defined as a state agency, the State Insurance Code provides that the Employer must operate according to a detailed series of specific codified legislative restrictions, and that the State's Insurance Commissioner or his representative has the right to attend all the meetings of the Employer or any of its committees. The Bureau has a governing committee which formulates the Bureau's budget and appoints the Bureau's general manager. The governing committee, which is elected by the insurance company members of the Bureau, is made up of six insurance company representatives. The six members respectively come from two nonstock companies, three stock companies, and the State Insurance Fund. Other committees which function in overseeing the Employer's operations are the

classification and rating committee, the actuarial committee, and various subcommittees. Each of these committees also consists of six members, and a representative of the State Workmen's Compensation Fund is represented on each committee.

Under the State's statutes workmen's compensation insurance is compulsory for virtually all employers in the State. The Insurance Code further requires that all insurance companies writing workmen's compensation must be a member of a rating organization. Since the Employer is the only organization in the State which performs such functions, all of the approximately 280 insurance companies licensed to write workmen's compensation insurance in California, including the California State Compensation Insurance Fund, are members of the Bureau.

The Bureau derives its operating revenue by charging each member a nominal membership fee and by assessments which are directly proportionate to the amount of premiums the individual member carrier has written within the State in the preceding year. The Bureau receives no subsidy of tax money from the State and no operating expenses are provided by the State's budget. The revenues collected by its assessments are its only source of income, 80 percent of which is used to pay employee salaries and benefits.

For the most part the insurance companies which are members are commercial companies which write workmen's compensation insurance and other forms of insurance and operate in States other than California. The most notable exception is the State Compensation Insurance Fund, mentioned above, set up by the California State legislature which operates only in California and writes approximately 22 percent of the total workmen's compensation insurance in California, twice as much as the next largest carrier.

As the State's sole rating organization, the Bureau is relied on by the State Insurance Commissioner to initially perform the evaluation function of setting the insurance rate and evaluating the performance of each insurance company. Depending upon their nature, complaints relating to classifications and rates are investigated by the Bureau, and normally requests or evidence presented by the carriers are submitted to or through the Bureau to the State Commissioner.

The Bureau's rulings concerning an issued insurance policy can be appealed to the Insurance Commissioner, although the Insurance Commissioner is not required to grant a hearing. The Commissioner has the statutory right to overrule or modify the Bureau's recommendation. In the typical case the Bureau's recommendations are recognized by the Commissioner as authoritative. If a hearing is held, the Bureau is generally represented. The parties may in certain cases carry their appeals, if an adverse decision is made, to the state courts. The Bureau may not.

The Bureau also evaluates proposed legislation which could affect the State's workmen's compensation legislation system. The Bureau's evaluation of prospective legislation is submitted to both the Commissioner and the legislature itself. The Bureau receives no compensation for this advisory service, but its work is nevertheless given substantial weight by the State Insurance Commissioner and in

practice the Commissioner has never supported any proposed legislation pertaining to the California workmen's compensation insurance system which the Bureau has opposed.

The Bureau, unlike nonstatutory insurance rating organizations operating in California with regard to classes of insurance other than workmen's compensation, is protected by a legislative declaration which grants it immunity from liability for malfeasance or misfeasance. In the case of the Bureau the reason for the grant does not appear to be the usual ground of governmental sovereignty, but to remove a possible impediment to its effective operations.

The employees of the Bureau are not state employees nor are they required to meet any civil service requirements. They are hired directly by the Bureau, trained by the Bureau, and subject to the Bureau's personnel policies. There is no showing that Bureau employees' salary scales are in any way related to those of state employees. The salaries are paid entirely from the Bureau's own budget which is raised by assessing members, including the State Fund. The State has no control over the employees, nor do the employees consider themselves state employees. In many cases, because the nature of the requirements of many of its jobs are unique to the Bureau, the Bureau conducts its own in-hours training programs, utilizing experienced executives who have worked in the insurance industry. It appears that the State Commissioner of Insurance has no authority to interfere in any way with the hiring, promoting, training, discharging, or the performance of any of the employees working for the Bureau.

Based on the above, and the record as a whole, we are unable to agree with the Employer that the Bureau is a "political subdivision" and the Section 2(2) exemption of the Act is applicable. Although the term "political subdivision" is nowhere defined in the Act, the Board and the courts have applied the political subdivision exemption to organizations that are either (1) directly created by the State, so as to constitute departments or administrative arms of the State government; or (2) administered by individuals who are responsible to public officials or to the general electorate.[3] We find that the Bureau meets neither criteria.

Contrary to the Employer, we do not find controlling the facts that its operations exist and were created by virtue of state statutes, that it is the only organization of its kind in the State, and that it operates only in the State of California. It is clear that the state code provides for competing organizations, and it is purely fortuitous that only one organization, the Bureau, was established to provide the necessary services, evaluations, and recommendations required by the state code for companies writing workmen's compensation in the State of California. Because of this situation the Bureau has built up an expertise and created a dependency by the State upon the work it performs, which gives much of the Bureau's work an aura of official action and public imprimatur. We find highly significant, however,

[3]Cf. *N.L.R.B.* v. *Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971); *Current Construction Corp.*, 209 NLRB 718 (1974); *The City Public Service Board of San Antonio*, 197 NLRB 312 (1972); *Natchez Trace Electric Power Association*, 196 NLRB 765 (1972), enfd. 476 F.2d 1042 (C.A. 5, 1973); *Fayetteville-Lincoln County Electric System*, 183 NLRB 101 (1970).

that its recommendations are not necessarily final and may be appealed to higher authorities.

We note that its operations are run by internal committees of the member companies. Although the Commissioner of Insurance has the right to have an *ex officio* representative on all governing committees, the role of such member is advisory and is only for liaison purposes. The presence of the state representative does not in our opinion make the committees or the Bureau a creature of the Commissioner or the State.

The Board has previously held that an employer engaged in rendering special rating services to groups of insurance companies pursuant to special statutory regulation in connection with their underwriting, and required to report such findings to the insurance commissioner, is not thereby operating as an arm or subdivision of the State.[4] It is immaterial that the employer is a nonprofit corporation motivated by considerations not strictly commercial where the activities the corporation supports are themselves commercial in nature.[5] We see no compelling reason for making an exception in this case because of special circumstances in which the Bureau operations here are confined only to the State of California, and because of its monopoly its recommendations and work are given important and, many times, controlling weight.

We find no merit to the Employer's argument that, if the work it performs were not done by the Bureau, the work

[4]See *Middle Department Association of Fire Underwriters*, 122 NLRB 1115 (1959).

[5]See *The New York Board of Fire Underwriters*, 193 NLRB 551 (1971).

would have to become a state function. Clearly, the State could set up a similar organization to do the work the Bureau performs. In any case such contention would appear to be speculative, since there is no showing in the record that the Employer intends to cease its operations now or in the near future, or that the State will in any way take over its work or functions.

Nor can we agree with the Employer's contention that it is administered by state-appointed or publicly elected officials. The record is clear that the Employer is privately organized, supported by nonstate revenues, and operates, much as a privately organized public utility generally operates, within the constrictions of its license and the State's laws and regulations. The Bureau performs functions not directly a part of the state government, outside the control of the State both as to its employment practices and its rates and oversight functions.

We note particularly that the Bureau sets its own labor relations policies, does it own hiring and firing, and handles its own personnel matters. Its employees are separate from the State's payroll and independent from the State's labor relations policies or requirements.

Accordingly, we find that the Employer is not a political subdivision of the State of California, but is an employer within the meaning of the Act.

Nor do we find support for the contentions of the Employer that the Board in its discretion should nevertheless refuse to assert jurisdiction since the work and the services provided by the Bureau are so closely related to the State's functions, which are exempt from the Board's jurisdiction,

and the State's control over the Bureau's operations are of such a high degree that the Bureau cannot in any case effectively bargain with a union.

We find, therefore, that the Employer is not the type of nonprofit business or operation over which the Board has declined to assert jurisdiction, and that it will effectuate the policies of the Act for the Board to assert jurisdiction in this case.

The parties disagree as to the scope of the unit and certain unit placements. The Petitioner seeks a unit loosely described as "all office clerical employees" and related employees located in San Francisco, California.

The Bureau's employees fall into several broad categories, which are designated Groups I through VII, based on skills, educational requirements, complexity of the work, degree of responsibility, technical knowledge of the work, professional status and salary levels.

There is no dispute regarding the employees in Groups V, VI, and VII which are not sought by the Petitioner. Nor is there any dispute regarding inclusion in the unit of the clerical employees in Groups I through III who perform filing, typing, keypunching, transcription and nontechnical statistical work, and other routine and repetitive tasks.

The Group I, II, and III jobs do not require advanced education or a knowledge of the technical rules and regulations under the California workmen's compensation law, or the use of independent judgment.

Part-time employees: The Employer, however, would exclude approximately 16 part-time Group I, II, and III clerical positions occupied by high school and college students. The work period of these students generally lasts one or two school semesters, and the students rarely remain with the Bureau as permanent employees. Normally part-time employees do not look upon their work as leading to a career with the Bureau and, in the event a part-time employee decides to remain with the Bureau following graduation from high school, such employee would not necessarily receive hiring preference over other applicants unless the employee had all the basic requirements for employment with the Bureau.

The part-time student employees may hold jobs with other employers, are paid lower wages than other Group I, II, and III employees, generally work different hours, and receive limited fringe benefits. No part-time employee has continued as a full-time Bureau employee since the summer of 1973.

On the basis of the foregoing, and the record as a whole, we conclude, in agreement with the Employer, that the part-time student employees lack a community of interest with regular full-time clerical employees. We shall, therefore, exclude them from the unit found appropriate herein.

Two accounting clerks: The Employer would also exclude two accounting clerks, Patty Lightell and Jan Monsef,[6] on the basis that they are confidential employees. Neither employee is involved in typing correspondence nor preparing documentation or other information which is directly related to the labor relations functions of the

[6]The parties agree that Eileen Masterson, Diane Wright, and Kaleria Sychoff, who work as secretaries to top personnel officials, should be excluded from the unit as confidential employees. We, therefore, exclude them from the unit here found appropriate.

unit. The Employer would base their exclusion on the fact that both employees have access to personnel files and confidential material of all Bureau employees and assist in preparing the information regarding advice on personnel matters. They also assist in preparing budget estimates for personnel items. However, they do not work under an official who is directly involved in personnel decisions, but under a supervisor who reports to the administrative division manager. The majority of the two accounting clerks' time is devoted to accounting matters and the preparation of expense accounts. In addition to having access to the Bureau's personnel files, the two accounting clerks, because of their proximity to the personnel offices, frequently have knowledge of various personnel decisions made by the Bureau before the employees affected by those decisions are made aware of the action by their supervisors.

In assessing the merits of the Employer's contention, we apply the standard the Board enunciated in *B. F. Goodrich Company,* 115 NLRB 722, 724 (1956), and has consistently followed; namely, clerical employees will be excluded as confidential only when it appears that they "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." This, of course, is not the factual situation here. Moreover, merely having access to personnel or confidential materials or files has never been a basis for applying an exception to the Board's standard.[7]

[7] *Weyerhaeuser Company,* 173 NLRB 1170, 1172-73 (1968).

Under the uncontradicted facts, we are not persuaded that the employees in question are disqualified from unit exclusion and find no basis for doing so on the contention that they are confidential employees. We shall, therefore, include the two accounting clerks in the appropriate unit.

Group IV employees: The Employer contends that the approximately 50 Group IV employees as a class are either professional and/or technical employees who have little or no community of interest with the approximately 200 clerical employees, described above as Group I, II, and III employees, and should be excluded from the unit sought by the Petitioner.

The job requirements of the Group IV employees involve the application, analysis, interpretation, and evaluation of the rules and regulations of the State's administrative, insurance, and labor codes, as well as a working knowledge of the pertinent state statutes.

The Bureau requires a 4-year undergraduate degree or other advanced educational achievement as a measure of learning capacity and ability for entering employees in Group IV. Group IVA is the entry level position to higher categories. It includes field representative trainees, programmer trainees, and underwriter trainees. Each Bureau employee in Group IVA is in training for the position indicated by his title. Thus, an underwriter trainee is being trained as an underwriter, a programmer trainee is being trained as a programmer, and a field representative trainee is being trained as a field representative.

Inasmuch as there is no specialized curriculum or degree in workmen's compensation insurance, considerable inten-

sive on-the-job training is provided. For example, the actuarial assistant is required to complete courses and pass examinations developed by the Casualty Actuarial Society. Computer programmers are required to take special courses designed specifically around the type of specialized insurance knowledge that is required to perform their duties for the Bureau. Group IV employees must take and complete college level courses dealing in all aspects of workmen's compensation insurance, commercial as well as noncommercial, before reaching the journeyman level. This may take a period of several years.

As Group IV employees acquire more knowledge, experience, skill, and expertise they become senior journeymen with the expectation that they will perform their work with a minimum of supervision and use independent judgment as guided by an expert knowledge of numerous manuals, codifications of the law and precedents, and developments in the field of workmen's compensation insurance.

Group IV employees, including auditors, underwriters, classifiers, statisticians, programmers, actuarials, and field representatives, are necessarily in constant contact with each other and must be familiar with the functions and operations of the work of other Group IV employees. Policy examination is a fundamental function for practically all employees in the Group IV classification, and most Group IV employees have had some training as a policy examiner. Indeed, such knowledge and experience is a requirement to promotion to higher classification work. Similarly, the Bureau does not assign employees

to the classification and audit review department until they have first had fieldwork experience.

Within Group IV there is not only constant upward mobility, but also horizontal transfers. Thus 7 out of the 20 employees in the policy examination department have had previous experience in other departments of the Bureau; practically all of the employees in the classification and audit review department, field service department, systems and programming department, and rating and statistical department have had work experience in at least one other department of the Bureau, and in many cases in several departments in its Group IV classifications. It is the policy of the Bureau to encourage exchange and interchange among Group IV employees, and such varied experience is a prerequisite to many of the positions. Within the past 10 years only two employees have been hired from Group I, II, and III jobs into Group IV jobs, and it is the policy of the Bureau to treat the Group IV jobs as a separate competitive area from the standpoint of advancement within the organization.

By contrast, employees in Group I through III jobs are considered to have the potential to advance only as far as Group III, the senior specialized rating clerk. By contrasting the job requirements of a policy examiner, the lowest level Group IV employee, with the duties of the senior specialized rating clerk, the highest level Group III employee, the marked demarcation between Group IV employees and the office clerical employees becomes readily apparent.

A Group IV policy examiner is required to have extensive knowledge and practical understanding of the technical manuals which guide the work of the Bureau. The policy examiner also regularly consults the Bureau's general files and has access to all Bureau memos, correspondence records, circulars, and technical memoranda. On the other hand, a Group III specialized rating clerk has no occasion to utilize the Bureau's work products, and works under close supervision, in some cases under Group IV staff members.

The distinctive and high level work of the Group IV employees can perhaps be best illustrated by the work done in the policy examination department. This department occupies the fourth and fifth floors of a multistory office building in an area separate and distinct from the office clerical employees.

The title given to positions in this department is "underwriter." They perform, *inter alia,* the following functions: (1) code policies and endorsements for computer processing; (2) examine rates and nonrated risks for compliance with the published rules and regulations, and determine when a particular policy or endorsement is in compliance; (3) request the field services to make physical surveys; (4) process applications for group insurance in accordance with the requirements of the Insurance Code; and (5) process high risks requiring excess insurance. In performing these functions they independently apply the laws and various interpretations of the State's code to the facts involved in a particular case in an approach not unlike that of an attorney. In addition, the underwriters

must have a working knowledge of the advanced computers used by the Bureau and must utilize them constantly in their work.

Employees working in field services, rating and statistical, classification and audit review, systems and programming, and actuarial departments are similarly required to have a comprehensive understanding of the code.

Based on the foregoing, and the record as a whole, we find, aside from any considerations as to whether the Group IV employees are either professional and/or technical employees, that they have little or no community of interest with the Group I, II, and III employees who are engaged almost entirely in routine, clerical work. Accordingly, we find that a combined unit of Group I, II, and III employees with the Group IV employees would be inappropriate.

We shall, therefore, exclude Group IV employees from the unit of office and clerical employees petitioned for by the Union, and direct an election only among the employees in classifications as described below.[8]

We find that the following group of employees constitutes an appropriate unit:

> All employees in classifications Groups I, II, and III, employed at the Employer's San Francisco, California, operation, including the accounting clerks, Monsef

[8]In the event the Petitioner does not wish to participate in an election in such a unit, we shall permit it to withdraw its petition without prejudice upon notice to the Regional Director within 5 days from the date of issuance of this Decision and we shall thereupon vacate the Direction of Election.

and Lightell, but excluding all part-time student employees, all Group IV employees, and all professional employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

Appendix C

California Inspection Rating Bureau and Professional and Clerical Employees Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20—CA—11192

August 9, 1976

DECISION AND ORDER

By Chairman Murphy and Members Fanning and Penello

Upon a charge filed on March 16, 1976, by Professional and Clerical Employees Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on California Inspection Rating Bureau, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 20, issued a complaint and notice of hearing on April 8, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 13, 1976, following a Board election in Case 20—RC—12062 the Union was duly

certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 3, 1976, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 15 and 21, 1976, respectively, Respondent filed its answer and amended answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 7, 1976, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 21, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

[1]Official notice is taken of the record in the representation proceeding, Case 20—RC—12062, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Ruling on the Motion for Summary Judgment

In its answer, amended answer, and response, Respondent denies that it is an employer engaged in commerce and that the Board has jurisdiction over it and further contends that the Union's certification is invalid because of its election objections, alleging material misrepresentations made by the Union, which were improperly overruled. Both Respondent and counsel for the General Counsel assert that there are no issues of fact requiring a hearing and that this is a proper case for summary judgment. We agree.

Review of the record, including that in the underlying representation proceedings, Case 20—RC—12062, indicates that, after a hearing in which jurisdiction and unit questions were litigated, the proceedings were transferred to the Board for decision. With respect to jurisdiction, Respondent contended (1) that the Respondent is exempt under the Act as a political subdivision of the State of California directly engaged in state-related functions, and (2) that, even if Respondent were not exempt but an employer in commerce under the Act, the Board should refuse to assert jurisdiction because of Respondent's special relationship to exempt state functions and because the high degree of state control precluded effective collective bargaining. In its Decision and Direction of Election[2] issued December 16, 1974, the Board found on the record that Respondent is not a political subdivision but is an employer within the meaning of the Act and exercised its discretion to assert, rather than to decline, jurisdiction. Accordingly, the Board directed an election in the unit

[2]215 NLRB 780 (1974).

found appropriate which was held on January 15, 1975, and was won by the Union.

Respondent filed timely objections alleging, in substance, (a) misrepresentations in law and fact including (1) benefits under current union contract, (2) specific terms which would be included in the contract the Union would negotiate, (3) union strike authority and procedure, and its strike record, and (4) union policies and rules, and (b) promises of benefit, including waiver of union fees and dues and the guarantee that a contract would result if the Union won the election. On April 23, 1975, after an investigation, the Acting Regional Director issued her Report on Objections recommending that a hearing be held on the two objections regarding the alleged misrepresentations concerning the Union's strike authority, procedure, and record and that all other objections be overruled.[3] Respondent filed timely exceptions to the report and a brief in support, reiterating its objections, contending that the denial of a hearing violated due process and requesting that the election be set aside. On June 19, 1975, the Board issued its Decision and Order adopting the Acting Regional Director's findings and specifically finding that the exceptions did not raise material or substantial issues of law or fact which would require setting the election aside or warranting a hearing on the objections which the Acting Regional Director recommended be overruled. Accordingly,

[3]The Acting Regional Director's recommendation to overrule was based on her findings that waiver of fees and dues was permissible, that promises of contractual benefits were mere puffing which would not warrant setting the election aside, and that Respondent's remaining objections were either unsupported by the evidence or involved union statements to which Respondent had replied.

the Board overruled these objections and ordered a hearing on the two strike objections.

After the hearing, in which the Respondent participated and subsequently filed a brief, the Hearing Officer issued his Report on Objections on November 5, 1975, in which he recommended that both objections be overruled substantially on the grounds (1) that the employees could evaluate statements regarding their right to vote on a strike issue and the Union's strike record, and (2) that, in any event, the statements did not constitute misrepresentations so substantial as to warrant setting the election aside. Respondent filed timely exceptions, basically excepting to the Hearing Officer's findings and lack thereof. On February 13, 1976, the Board issued its Supplemental Decision and Certification of Representative in which it adopted the Hearing Officer's findings and recommendations, and specifically found that Respondent's exceptions did not raise material or substantial issues of law or fact requiring the Board to set the election aside. Accordingly, the Board overruled the objections and certified the Union. It thus appears that Respondent seeks in this proceeding to relitigate issues raised and resolved in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

[4]See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[5] We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

1. The Business of the Respondent

Respondent is a nonprofit association organized under the laws of California, with an office and place of business in San Francisco, California, where it is engaged in the business of performing the workmen's compensation insurance rating function, pursuant to the California Insurance Code, CIC. Respondent during the past calendar year, in the course and conduct of its business operations, received gross revenues in excess of $500,000 and performed services valued in excess of $50,000 for various insurance companies located within California, which insurance companies, including State Farm Insurance Company, Continental Insurance Company, and Allstate Insurance Company, in turn performed services in California valued in excess of $50,000 directly for customers located outside California.

[5]In its answer and amended answer to the complaint Respondent denies the appropriateness of the unit. In the underlying representation proceeding, Case 20—RC—12062, Respondent contended that Group IV employees, part-time student employees, and two accounting clerks who allegedly were confidential employees should be excluded from the unit. In its Decision and Direction of Election, the Board agreed to exclude Group IV and part-time student employees, but rejected the contention that the accounting clerks were confidential employees and included them in the unit. Since Respondent has litigated unit issues in the representation case it may not relitigate those issues herein.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Professional and Clerical Employees Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees in classifications Groups I, II, and III, employed at the Employer's San Francisco, California, operation, including the accounting clerks, Monsef and Lightell, but excluding all part-time student employees, all Group IV employees, and all professional employees, confidential employees, guards,

and supervisors as defined in the National Labor Relations Act.

2. The certification

On January 15, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 20 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on February 13, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about February 19, 1976, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 3, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since March 3, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. California Inspection Rating Bureau is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Professional and Clerical Employees Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees in classifications Groups I, II, and III, employed at the Employer's San Francisco, California, operation, including the accounting clerks, Monsef and Lightell, but excluding all part-time student employees, all Group IV employees, and all professional employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 13, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 3, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, California Inspection Rating Bureau, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Professional and Clerical Employees Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees in classifications Groups I, II, and III, employed at the Employer's San Francisco, California operation, including the accounting clerks,

Monsef and Lightell, but excluding all part-time student employees, all Group IV employees, and all professional employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its San Francisco, California, operation copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to

[6]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Appendix

Notice To Employees
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Professional and Clerical Employees Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees in classifications Groups I, II, and III, employed at the Employer's San Francisco, Cali-

fornia, operation, including the accounting clerks, Monsef and Lightell, but excluding all part-time student employees, all Group IV employees, and all professional employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

California Inspection Rating Bureau

Appendix D

California Inspection Rating Bureau and Professional and Clerical Employees, Division of Teamsters Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20—CA—11192

August 22, 1977

SUPPLEMENTAL DECISION

By Chairman Fanning and Members
Jenkins and Murphy

On August 9, 1976, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in unfair practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, and ordering the Respondent to cease and desist therefrom and to take certain affirmative action to remedy such unfair labor practices.

Upon its own motion, the Board decided, on April 5, 1977, to reconsider its Decision and Order and consider whether the Board has properly asserted jurisdiction over the operations of the Respondent. Thereafter, the Respondent and the General Counsel of the National Labor Relations Board filed statements of position.

[1] 225 NLRB 870.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the above-entitled Decision and Order, the statements of position of the Respondent and the General Counsel, and the entire record in this case and has decided to reaffirm its decision to assert jurisdiction over the Respondent.

In rejecting the Respondent's jurisdictional defense in the earlier Decision and Direction of Election,[2] the Board found, *inter alia,* no merit to the Respondent's contentions that its operations are exempted from the Board's jurisdiction because the Respondent was created by virtue of state statutes and regulations, and that if the work were not done by the Respondent it would be done by the State of California. We set forth in more detail our reasons for this conclusion.

The Board has never, as contended by the Respondent, held that merely because a function or service is mandated by state statutes or legislature the work in question *per se* becomes intimately connected with the state and thereby is exempted from the Board's jurisdiction. The Board's test in such cases is an examination of all the factors in the situation, including the nature of the functions which have been mandated by the state, whether the activities concern traditional essential governmental functions as distinguished from commercial operations, and

[2]215 NLRB 780 (1974).

the degree of control exercised by the exempt entity over the operations.[3]

The insurance rating activities engaged in by the Respondent here are similar to commercial enterprises engaged in by employers in the private sector in other States and are not a universally recognized, traditional governmental function within the meaning of the cases. The fact that the Respondent has been established by the state legislature does not detract from the commercial nature of the operation. As noted in our Decision and Direction of Election, the Respondent sells its services to private insurance companies and not to the State of California, and its labor relations, personnel practices,

[3]See, e.g., *Rural Fire Protection Company,* 216 NLRB 584 (1975); *Grey Nuns of the Sacred Heart,* 221 NLRB 1215 (1975); *National Maritime Union of America, AFL-CIO (Puerto Rico Marine Management, Inc.),* 227 NLRB 20 (1976); *Nichols Sanitation, Inc.,* 230 NLRB 834 (1977).

In asserting jurisdiction over this Employer, Chairman Fanning is not relying on the Employer's lack of intimate connection with the State of California. Rather he relies only on the degree to which the Employer involved herein retains control over the working conditions of its employees thus evidencing its capability of engaging in meaningful collective bargaining. See Chairman Fanning's dissenting opinions in *Rural Fire Protection Company, supra,* and *Nichols Sanitation, Inc., supra,* and his concurring opinion in *Grey Nuns of the Sacred Heart, supra.*

Cf. *Columbia Transit Corporation,* 226 NLRB 812 (1976); Chairman Fanning dissenting. We do not construe the language at fn. 8 of that decision in which neither Members Jenkins nor Murphy participated, and Chairman Fanning dissented as establishing a *per se* principle that functions created or authorized by state statute thereby become a part of, or integrally related to, an exempt governmental entity, and we shall adhere to our established grounds for evaluating such relationship. As noted above, Chairman Fanning relies only on the extent of control exercised by any governmental body in determining whether the Board should exercise its jurisdiction.

and day-to-day administration are independent of state control.[4]

Accordingly, we reaffirm the Conclusions of Law and the Order provided in the Decision and Order in the above-entitled proceeding.

[4]Cf. *Roesch Lines, Inc.*, 224 NLRB 203 (1976); *Embree Buses, Inc.*, 226 NLRB 714 (1976); *Austin Development Center, Inc.*, 226 NLRB 134 (1976).

Appendix E

Pertinent Provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

Sec. 8(a) It shall be an unfair labor practice for an employer—

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 9(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Appendix F

Pertinent Provisions of Part 3, Chapters 2 and 3, of the California Insurance Code Relating to Workers' Compensation Insurance.

§ 11630. "Compensation"

As used in this chapter, the term 'compensation' means the benefits insured by workers' compensation insurance.

§ 11631. "Insurer"

As used in this chapter, the term "insurer" includes the State Compensation Insurance Fund.

§ 11650. Presumption

Every contract insuring against liability for compensation and every compensation policy is conclusively presumed to contain all of the provisions required by this article.

§ 11651. Direct liability of insurer

Every such contract or policy shall contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of any compensation for which the employer is liable, subject to the provisions, conditions and limitations of the policy.

§ 11652. Notice or knowledge of injury

Every such contract or policy shall contain a clause to the effect that, as between the employee and the insurer, notice to or knowledge of the occurrence of the injury on the part of the employer will be deemed notice or knowledge, as the case may be, on the part of the insurer.

§ 11653. Jurisdiction

Every such contract or policy shall contain a clause to the effect that jurisdiction of the employer will, for the purpose of the law imposing liability for compensation, be jurisdiction of the insurer.

§ 11654. Liability of insurer for award against employer

Every such contract or policy shall contain a clause to the effect that the insurer will in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer under the provisions of the law imposing liability for compensation, subject to the provisions, conditions and limitations of the policy. The insurance contract shall govern as between the employer and insurer as to payments by either in discharge of the employer's liability for compensation.

§ 11655. Insolvency of employer

Such policy shall not contain any provisions relieving the insurer from payment when the employer becomes insolvent or is discharged in bankruptcy, or otherwise, during the period that the policy is in operation or the compensation remains owing.

§ 11656. Lien of employee

Such policy shall also provide that the employee has a first lien upon any amount which becomes owing to the employer from the insurer on account of the policy, and that in case of the legal incapacity or inability of the employer to receive the money and pay it to the claimant, the insurer will pay it directly to the claimant. To the

extent of such payment, the obligations of the employer to the claimant are thereby discharged.

§ 11656.6. Group policies: Conditions

An insurer may issue a workers' compensation policy insuring an organization or association of employers as a group of such organization or association complies with the following conditions:

(a) Files with the commissioner or a licensed workers' compensation rating organization designated by him:

(1) A copy of its articles of incorporation and bylaws or its agreement of association and rules and regulations governing the conduct of its business, all certified by the custodian of the originals thereof;

(2) A statement setting forth its reasons for desiring insurance as a group;

(3) A statement certifying that at least 75 percent of its regular membership is engaged in a common trade or business, and an agreement that such percentage of membership will be maintained during such time as a group workers' compensation policy issued to such organization or association is in force;

(4) An agreement that only those members who are engaged in a common trade or business shall be named by the organization or association in any statement to the commissioner, a licensed workers' compensation rating organization or insurer as eligible for insurance as a member of the group, and an agreement that it will immediately notify its insurer if any member of such organization fails to remain a member in good standing in accordance

with the basic law, rules and regulations of such organization or association;

(5) A statement in writing undertaking to establish and maintain a safety committee which by education and otherwise will seek to reduce the incidence and severity of accidents; and

(6) An agreement in writing duly executed guaranteeing that, if the insurer notifies the organization or association of the nonpayment of a premium by an insured member of the organization or association within 60 days after the premium was due, the organization or association will pay to the insurer the amount of any past due premium which does not exceed the amount of the dividends that are due to the organization or association or its members from the insurer. The organization or association shall promptly notify the insurer of the known insolvency of any member of the group plan, and shall request upon learning of such insolvency, removal of the member from the group plan. A copy of the resolution of the governing board of such organization or association authorizing the execution of the guarantee agreement shall be filed with the commissioner or a licensed workers' compensation rating organization designated by him and with any insurer issuing a group policy.

* * *

§ 11658. Approval by commissioner

A workmen's compensation policy shall not be issued by any insurer unless it is previously approved, as to substance and form, by the commissioner. Before approving such a policy, the commissioner shall consult concerning it with the Industrial Accident Commission.

§ 11659. Limiting endorsements

Such approved form of policy, limited pursuant to section 11657, shall not be otherwise limited except by endorsement thereon in accordance with a form prescribed by the commissioner or in accordance with rules adopted by the commissioner. Before prescribing such form or adopting such rule, the commissioner shall consult concerning it with the Industrial Accident Commission.

§ 11730. "Merit rating": "Workmen's compensation insurance"

The term "merit rating," as used in this article, means "schedule rating," in which the rate is varied according to physical conditions, and also means "experience rating," in which the California workmen's compensation insurance experience of the particular insured is used as a factor in raising or lowering his rate.

Unless a different meaning is manifest, the term "workmen's compensation insurance," as used in this article, also means employer's liability insurance incidental to and written in connection with workmen's compensation insurance.

§ 11732. Classification of risks and premium rates: Merit rating system

The commissioner shall approve or issue, as adequate for all admitted workers' compensation insurers, a classification of risks and premium rates relating to California workers' compensation insurance. He may also approve or issue a system of merit rating. Such classification and system shall be uniform as to all insurers affected.

§ 11736. Conformity to approved rates

An insurer shall not issue, renew or continue in force any workers' compensation insurance under a law of this state at premium rates which are less than the rates approved or issued by the commissioner. The effective date of such rates shall be the date fixed by the commissioner.

§ 11750. Purpose of article

The purpose of this article is to promote the public welfare by regulating concert of action between insurers in collecting and tabulating rating information and other data that may be helpful in the making of adequate minimum rates for workmen's compensation insurance and for employers liability insurance incidental thereto and written in connection therewith for all admitted insurers and in submitting them to the commissioner for issuance or approval; to authorize and regulate the existence and cooperation of qualified rating organizations to one of which each workmen's compensation insurer shall belong; to authorize and regulate cooperation between insurers, rating organizations and advisory organizations in rate making and other related matters to the end that the purposes of this chapter may be complied with and carried into effect.

§ 11750.1. Definitions

As used in this article, unless a different meaning is manifest, the term:

a. "Insurer" means every insurer authorized to transact workmen's compensation insurance and employer's liability insurance incidental thereto and in connection therewith in

this State, including the State Compensation Insurance Fund;

b. "Rating organization" means any organization which has as its primary object or purpose the collecting of rating information, the making of rates, rating plans and rating systems for workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith and presenting them to the commissioner for issuance or approval;

c. "Insurance" means workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith;

d. "Wilful" or "wilfully" in relation to an act or omission which constitutes a violation of this article means with actual knowledge or belief that such act or omission constitutes such violation and with specific intent to commit such violation.

e. "Advisory organization" means every person, group or organization, other than an insurer, whether located within or without this State, which prepares policy forms or underwriting rules incidental to or in connection with workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith or which collects and furnishes to admitted insurers or rating organizations rating experience, loss or expense statistics or other statistical information and data relating to workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith and acts in an advisory capacity to

such insurers or rating organizations as distinguished from a rate making capacity. No duly authorized attorney at law acting in the usual course of his profession shall be deemed to be an advisory organization.

§ 11750.2. Application of article

The provisions of this article shall apply to all workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith in this State, except reinsurance.

§ 11750.3. Purpose of organization

A rating organization may be organized pursuant to this article and maintained in this State for the following purposes:

a. To provide reliable statistics and rating information in respect to workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith.

b. To collect and tabulate information and statistics for the purpose of developing minimum adequate premium rates to be submitted to the commissioner for issuance or approval.

c. To formulate rules and regulations in connection with issued or approved rates and the administration of classifications and rating systems and to present same to the commissioner for approval.

d. To inspect risks for classification or rate purposes and to furnish to the insurer and upon request of the employer and after notice to the insurer, to furnish to the

employer full information concerning the rates applicable to his insurance.

e. To examine policies, daily reports, endorsements or other evidences of insurance for the purpose of ascertaining whether they comply with the provisions of law and to make reasonable rules governing their submission.

f. Within one year after expiration of any workmen's compensation insurance policy, to initiate test audits of insured employer's payrolls and insurer's audits of such payrolls to check the accuracy and reliability thereof, and to examine all records relative thereto and premises of insured employers so that the classifications of such employers and the charging of premium at not less than the applicable approved minimum premium rates applied to such payroll segregated in accordance with the applicable approved Manual of Rules, Classifications and Basic Rates for Workmen's Compensation Insurance can be assured.

g. To exchange information and experience data with rating organizations, advisory organizations, and insurers in this and other states, in respect to ratemaking.

h. To become a member or subscriber of any lawfully authorized ratemaking or advisory organization whenever membership in such organization is necessary or helpful to the rating organization.

i. To perform all acts necessary, incidental or convenient to carry out the foregoing purposes or the provisions of this chapter relating to rating organizations.

§ 11751. Application for license

On and after January 1, 1952, no rating organization shall conduct its operations in this state without first having filed with the commissioner a written application for and securing a license to act as a rating organization. Any rating organization may make application for and obtain a license as a rating organization if it shall meet the requirements for license set forth in this article. The fee for filing an application for a license as a rating organization is one hundred fifty dollars ($150) payable in advance to the commissioner. Every such rating organization shall file with its application:

a. A copy of its constitution, its articles of incorporation, agreement of association, and of its bylaws, rules and regulations governing the conduct of its business, all certified by the custodian of the originals thereof.

b. A list of its members who shall not number less than five insurers authorized to write and writing workers' compensation insurance in this state and whose combined experience shall be determined by the commissioner to be reasonably adequate for ratemaking purposes.

c. The name and address of a resident of this state upon whom notices of the commissioner or process affecting such rating organization may be served.

d. A statement of its qualifications as a rating organization.

§ 11751.1. Requirements for license

To obtain and retain a license, a rating organization shall provide satisfactory evidence to the commissioner that it will:

a. Permit any insurer to become a member at a reasonable cost and without discrimination, or to withdraw therefrom.

b. Neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member as a condition to membership to adhere to rates, greater than the minimum adequate rates approved by the commissioner.

c. Neither adopt any rule nor exact any agreement, the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders or members.

d. Neither practice nor sanction any plan or act of boycott, coercion or intimidation.

e. Neither enter into nor sanction any contract or act by which any person is restrained from lawfully engaging in the insurance business.

f. Notify the commissioner promptly of every change in its constitution or articles of incorporation, agreement of association, or in its by-laws, rules and regulations governing the conduct of its business; its list of members; and the name and address of the resident of this State designated by it upon whom notices or orders of the commissioner or process affecting such organization may be served.

g. Agree that the commissioner or his representative may attend all meetings of the organization or any of its committees.

h. Maintain reasonable records of the experience of its members and of the data, statistics or information collected or used in connection with the rates, classifications, rating plans, rating systems, manual rules, and policy and endorsement forms used by its members so that such records will be available at all reasonable times to enable the commissioner to determine whether the rating organization and its members comply with the provisions of this chapter applicable to them. Such records shall be maintained in an office within this State. The commissioner may prescribe a uniform system for the keeping of such records which shall be reasonably adapted to the rating organization and its members' method of operation and which shall be applicable to all rating organizations licensed under this article and their members.

§ 11751.3. Constitution, articles, and by-laws

Subject to the approval of the commissioner, a rating organization licensed under this article may adopt any reasonable constitution, articles of incorporation or agreement of association, and may make reasonable rules for the regulation of its members and the conduct of its business by by-laws or otherwise. In a rating organization of which the State Compensation Insurance Fund is a member, it shall be entitled without election to membership on the managing or governing committee and on the classification and rating committee thereof.

§ 11751.4. Duty of insurer to be member

From and after the taking effect of this act, it shall be the duty of every insurer to be a member of a rating organization. No insurer may at the same time belong to more than one rating organization licensed under this article.

§ 11751.5. Rules and plans: Statistical agent

The commissioner, after notice and hearing, may promulgate reasonable rules and statistical plans, which may be modified from time to time and which shall be used thereafter in the recording and reporting by insurers of their loss and expense experience in order that the experiences of all insurers may be made available in such form and detail as may be necessary to aid the commissioner in administering the provisions of Article 2 of this chapter. The commissioner may designate any rating organization licensed under this article as his statistical agent to gather and compile such experience statistics and all licensed rating organizations shall report the experience of their members to such designated rating organization. Subject to reasonable rules approved by the commissioner, such designated rating organization shall make such experience statistics, when compiled, available to all licensed rating organizations and may make a reasonable charge to other rating organizations for the expense incurred by it in combining, tabulating and compiling the experience of all workmen's compensation insurers.

§ 11752. Examination by commissioner

The commissioner may, as often as reasonable and necessary, make or cause to be made an examination of each rating or advisory organization to ascertain whether such

organizations comply with the legal requirements applicable to it under this article.

In lieu of any such examination the commissioner may accept the report of an examination made by the insurance supervisory official of another state or the report of a representative designated by the National Association of Insurance Commissioners.

§ 11752.1. Examination by commissioner: Officers and employees

The officers, managers, agents or employees of any such organization may be examined by the commissioner at any time under oath and shall exhibit all books, records, accounts, documents or agreements governing its method of operation together with all data, statistics and information of every kind and character collected or considered by such organization in the conduct of the operations to which the examination relates.

§ 11753.1. Appeal from decision of organization

Any person aggrieved by any decision, action or omission to act of a rating organization may request the rating organization to reconsider such decision, action or omission. If the request for reconsideration is rejected or is not acted upon within 30 days by the rating organization the person requesting reconsideration may within a reasonable time thereafter appeal from the decision, action or omission of the rating organization to the commissioner by filing a written complaint and request for a hearing specifying the grounds relied upon. If the commissioner has information on the subject appealed from and he believes that probable cause for the appeal does not exist or if he believes that

the appeal is not made in good faith, he may deny the appeal without a hearing; otherwise, he shall hold a hearing to consider and determine the matter presented by the appeal.

§ 11755. Refusal to cooperate with commissioner or organization

No person, insurer, rating or advisory organization shall willfully withhold information from, or knowingly give false or misleading information to, the commissioner or to any rating organization, which will affect the rates, rating systems or premiums for workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith.

In the event of the refusal by any insured employer to permit an audit or an examination provided for in subdivision (f) of Section 11750.3, the commissioner shall, upon the verified petition of the rating organization concerned, take such action as he may be authorized to take pursuant to and subject to the provisions of this code and of the Government Code.

§ 11759. Immunity from liability

The Legislature hereby finds and declares as follows: The Legislature pursuant to its plenary power over workers' compensation granted by Section 4 of Article XIV of the California Constitution has authorized classification of risks and premium rates and systems of merit rating for workers' compensation insurance. The selective and discretionary inspection of locations, plants and operations of employers for classification and rating purposes, the gathering and compiling of experience statistics and other data

by rating organizations licensed by the Insurance Commissioner, and the application of standards predicated upon the reliability of such classifications and merit rating data are essential to the proper functioning of the classifications of risks and premium rates and systems of merit rating which are regulated by the Insurance Commissioner as authorized by the Legislature.

In order to implement and facilitate the proper and adequate administration of such classifications of risks and rates and systems of rating by such licensed rating organizations and the Insurance Commissioner, it is important and in the public interest that licensed rating organizations and their officers and employees shall not be liable for injury or death or other damage caused or alleged to have been caused by their failure to inspect, or negligent or incomplete inspection of, an employer's location, plant or operation for classification or rating purposes.

No licensed rating organization or member thereof in its character as a member, or officer or employee of such licensed rating organization when acting within the scope of his employment, shall be liable for injury or death or other damage proximately caused by a failure to inspect, or the manner or extent of inspection of, an employer's locations, plants or operations for classification or rating purposes, or by such person's comment, or failure to comment, on the subject matter or object of such inspection.

This section shall not be construed as implying the existence of liability in circumstances not defined in this section; nor as implying a legislative recognition that, except for the enactment of this section, a liability has existed or would exist in circumstances stated in this section.

Appendix G

Pertinent Provisions of the California Administrative Code, Title 10:

2261. Same: Submission Requirements. Each insurer must submit its California Approved Form limiting and restricting endorsement forms to the Workers' Compensation Insurance Rating Bureau of California in triplicate for examination by the Bureau and transmittal to the Insurance Commissioner. Each such form shall be deemed to be approved by the Insurance Commissioner unless, within 30 days from the date of submission by the California Inspection Rating Bureau, the Insurance Commissioner shall in writing notify the insurer submitting the form that same is disapproved. If such notification of disapproval is not given within said 30 days, all such forms shall be deemed to be approved until 10 days after date of written notification of disapproval.

2262. Other Limiting and Restricting Endorsements: Approval. All other limiting or restricting endorsement forms must be drafted in accordance with and subject to the specifications enumerated in Section 2257, and must be submitted in triplicate to the Workers' Compensation Insurance Rating Bureau of California for its examination and transmittal to the Insurance Commissioner. After consultation with the Division of Industrial Accidents as required by law, the insurer will be notified of approval or disapproval of any such form.

2266. Use of Form No. 11; Notification to Insured. Upon issuance of any completed California Approved

Form Endorsement No. 11 the insurer must submit such endorsement in triplicate to the Workers' Compensation Insurance Rating Bureau of California. Upon receipt of such Form No. 11 endorsement, the Bureau shall notify the insured in writing, with duplicate copy to be furnished the Division of Industrial Accidents, of the nature of the limitation or restriction. Such notification shall also inform the insured that in the event of a claim arising within the scope of the limitations, which the Division of Industrial Accidents should hold to be compensable, the employer would be directly liable under the law and not protected by the policy. Such endorsement shall then be transmitted to the Insurance Commissioner. Each such endorsement shall be deemed to be approved by the Insurance Commissioner unless, within 30 days from the date of submission by the Workers' Compensation Insurance Rating Bureau of California the Insurance Commissioner shall in writing notify the insurer submitting the endorsement that same is disapproved. If such notification of disapproval is not given within said 30 days, all such endorsements shall be deemed to be approved until 10 days after the date of written notification of disapproval.

Supreme Court, U. S.
FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

No. 78-1704

In the Supreme Court of the United States

OCTOBER TERM, 1978

CALIFORNIA INSPECTION RATING BUREAU,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

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CALIFORNIA INSPECTION RATING BUREAU,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner is a nonprofit association organized under California law to perform rating and statistical work with respect to firms that issue workmen's compensation insurance policies in that state.[1] In response to a petition filed by the Pro-

[1] The California Insurance Code, Cal. Ins. Code § 11750.1(b) (West 1972), defines a "rating organization" such as petitioner as "any organization which has as its primary object or pur-

fessional and Clerical Employees Division of Teamsters Local No. 856 ("the Union"), the Board directed an election among petitioner's employees. In its Decision and Direction of Election (Pet. App. B-1 to B-18), the Board rejected (Pet. App. B-7 to B-9) petitioner's contention that it is a "political subdivision" of the State of California under Section 2(2) of the National Labor Relations Act, 29 U.S.C. 152(2), which defines "employer" to exclude "any State or political subdivision thereof." The Board also rejected (Pet. App. B-9 to B-10) petitioner's alternate contention that the Board in its discretion should decline to exercise jurisdiction because of petitioner's "intimate connection" with the State and its functions (Pet. App. B-2). The Union won the election and was certified; petitioner refused to bargain and the Union filed an unfair labor practice charge. The Board granted the General Counsel's motion for summary judgment and ordered petitioner to bargain

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pose the collecting of rating information, the making of rates, rating plans and rating systems for workmen's compensation insurance and employer's liability insurance incidental thereto and written in connection therewith and presenting them to the commissioner for issuance or approval" (see Pet. App. F-7). As the Board found (Pet. App. B-2 to B-3, B-7), the Code does not preclude the establishment and operation of more than one rating organization, although only one has been established. However, only one rating organization may be designated by the State Insurance Commissioner as his agent to gather and compile statistics under § 11751.5 of the Code and petitioner has been so designated. (Pet. App. F-10 to F-13, B-3; Tr. 110-112, 140-143, 83.) ("Tr." references are to the transcript of the pre-election representation hearing in June, July, and August, 1974.)

with the Union (Pet. App. C-1 to C-14). Thereafter, the Board issued a supplemental decision (Pet. App. D-1 to D-4), explaining further its reasons for exercising jurisdiction over petitioner.

2. The court of appeals enforced the Board's order (Pet. App. A-2 to A-3). It held that the Board, in rejecting petitioner's Section 2(2) defense, had "correctly applied the principles stated by the Court" in *NLRB* v. *Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-605 (1971) (Pet. App. A-2). The court also found that the Board's discretionary determination to exercise its statutory jurisdiction in this case "has a reasonable basis in the evidence and is not inconsistent with the law," quoting *NLRB* v. *E. C. Atkins & Co.*, 331 U.S. 398, 403 (1947) (Pet. App. A-3).

3. Petitioner agrees (Pet. 12) that *NLRB* v. *Natural Gas Utility District, supra*, governs this case. Its contention that the Board and the court of appeals, in applying that case to these facts, reached an incorrect result turns on the facts of this case and presents no issue warranting this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951).

In any event, the Board's determination that petitioner is not a political subdivision of the State is in full accord with *NLRB* v. *Natural Gas Utility District, supra.*[2] The Court there determined that the

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[2] There is no merit to petitioner's contention (Pet. 12) that the Board "assumed, in rejecting [petitioner's] claim of political subdivision status, that Petitioner was a nonexempt

employer utility district was a political subdivision of the State under the Board's own standards because it was "administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 605 (emphasis omitted). As the Court pointed out, the district was administered "by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens." *Ibid.* In addition, the district was created by order of a county judge, was declared by statute to be a "municipality" or public corporation, and had the power of eminent domain and the power to subpoena witnesses. 402 U.S. at 606-608.

Here, by contrast, the Board found (Pet. App. B-7) that petitioner was neither "directly created by the State" nor "administered by individuals who are responsible to public officials or to the general electorate." Although the California Insurance Code provides that a rating organization like petitioner "may be organized" pursuant to the Code, it does not provide that any entity so organized is to be a state

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employer and that, accordingly, the decision to decline jurisdiction was discretionary * * *." As the court of appeals found (Pet. App. A-2), petitioner's defense that it was exempt as a political subdivision of the State was "carefully considered by the Board" and properly rejected under *NLRB* v. *Natural Gas Utility District, supra.* Indeed, petitioner apparently abandoned this defense in the court of appeals, for its brief did not even cite *NLRB* v. *Natural Gas Utility District.* Petitioner instead relied on the alternate contention that the Board should have declined jurisdiction as a discretionary matter.

agency (Pet. App. F-8; Cal. Ins. Code § 11750.3 (West 1972)). Petitioner's membership consists of the approximately 280 insurance carriers licensed to write workmen's compensation insurance in the State; they alone fund its operations and elect five of the six members of its governing committee (Pet. 7-8; Pet. App. B-3, B-4, B-9, F-13; Tr. 28-29, 61). The sixth member is a representative of the State Compensation Insurance Fund (Pet. App. B-3, F-12; Tr. 28-29), a workmen's compensation insurance carrier that is run by the State, in competition with private companies (Pet. App. B-4 to B-5; Tr. 114, 29). The State Fund member does not represent the State Insurance Commissioner; he represents an insurance carrier, as do the five representatives of private insurance companies, who may outvote him (Tr. 115-116, 29, 102). None of the private insurance company representatives on the governing committee is paid by the State; none is answerable to the State, the State Insurance Commissioner, or the general public (Tr. 113, 103-104).

4. Petitioner's contention (Pet. 13) that the decision of the Board "contravene[s] the intent of the California Legislature in denying public employees the right to strike" assumes that petitioner's employees are public employees. But the Board found, with substantial evidentiary support, that petitioner's employees are not state employees; they are not covered by civil service, and their compensation, hiring, training, labor relations and other employment conditions are within the exclusive control of petitioner, a non-

governmental employer (Pet. App. B-6, B-9; Tr. 64, 101, 112, 245-252). Similarly, there is no merit to petitioner's contention (Pet. 14-15) that a constitutional issue is presented by the Board's assertion of jurisdiction in this case, given the Board's factually supported finding that petitioner is not a political subdivision of the State.

Finally the cases cited by petitioner (Pet. 15) do not support its contention that it is a political subdivision of the State and thus exempted under Section 2(2) of the Act. Rather, they involve the Board's "intimate connection" test, under which the Board, as a matter of discretion, declined to assert jurisdiction over nongovernmental employers who performed services that were "intimately connected" with the exempt functions of a governmental entity.[3] As the court of appeals found in approving the Board's application of its intimate connection test here (Pet. App. A-3), the Board "has considerable discretion in deciding whether or not to exercise jurisdiction that it has" and its decision to exercise its jurisdiction over petitioner had a reasonable evidentiary basis and was not inconsistent with the National Labor Relations Act. Accordingly, whether the Board properly applied that test in other cases does not affect its decision to exercise jurisdiction here.

[3] Shortly before the court of appeals issued its decision in this case, the Board abandoned its "intimate connection" test and announced that it would no longer decline jurisdiction over nongovernmental employers on this basis. *National Transportation Service*, 240 N.L.R.B. No. 64, 100 L.R.R.M. 1263 (Feb. 5, 1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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